71ST CONGRESS
3d Session

SENATE

DOCUMENT
No. 327

INJUNCTIONS IN LABOR DISPUTES

STATEMENT

BY THE

HON. HENRIK SHIPSTEAD

A SENATOR FROM THE STATE OF MINNESOTA

ON THE BILL (S. 2497) TO AMEND THE JUDICIAL CODE AND TO DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY, AND FOR OTHER PURPOSES

TOGETHER WITH

A MEMORANDUM ON THE SUBSTITUTE BILL

BY WINTER S. MARTIN

PRESENTED BY MR. THOMAS OF OKLAHOMA

FEBRUARY 17 (calendar day, MARCH 4), 1931.—Ordered to be printed

UNITED STATES

GOVERNMENT PRINTING OFFICE

WASHINGTON : 1931

INJUNCTIONS IN LABOR DISPUTES

The question of the injunction in labor disputes is of nation-wide interest. It is now in the Senate in the form of a bill reported from the Judiciary Committee adversely with a majority and minority report.

A subcommittee of that committee, consisting of Senators Norris, Blaine, and Walsh of Montana, have during the last three years conducted extensive hearings, have amended the original bill and made the minority report. The gratitude of the Senate is due these Senators for the diligent and earnest work done on this very complicated subject.

In view, however, of the differences of opinion developed, and the radical changes effected in the original S. 2479, a further independent study has been prosecuted at my request, the results of which are presented herewith. After analysis of both majority and minority reports, Mr. Martin and his associates propose an alternative and carefully drawn measure. This proposal is so fundamental and yet from an angle so new, with an apparent probable effect so eminently fair and desirable, that it is commended to the serious consideration of those in Congress and in private life who are interested in an effective remedy for the acknowledged evils accumulating from the continued abuse of the writ of injunction in labor disputes.

HENRIK SHIPSTEAD.

PART 1

A MEMORANDUM ON THE SUBSTITUTE BILL S. 2497

By WINTER S. MARTIN, *Attorney at Law, Seattle, Wash.*

The subcommittee of the Senate Judiciary Committee rejected Senator Shipstead's antiinjunction bill, which was introduced in the Seventieth Congress. It was the opinion of the committee that the bill would deny to property in many cases the protection properly afforded by injunction, and that it would not do to pass the bill in its original form.

The subcommittee then introduced a bill widely different in its terms and construction, but which had for its purpose and object a drastic curtailment of the powers of Federal equity courts in issuing injunctions in labor disputes.

More than 700 pages of testimony taken during the hearings convinced the subcommittee of the necessity for corrective legislation against the highly oppressive and drastic labor injunction of the present day. It only remains to determine whether the substitute measure will accomplish what those who drew it claim for it. In connection with the substitute bill as originally introduced by the subcommittee in lieu of the original Shipstead bill, we shall call attention also to the amendments made by the committee after the substitute was offered. We thus have in effect a third measure, quite different from the two earlier ones.

This amended substitute bill will come before the Senate for final action some time during the present session. On this amended substitute, viz, the second committee print, bearing date of May 19, 1930—the majority of the committee are against passing the bill. They say:

> Whatever there may be of merit in the contention of those who believe that the situation in part of the field of labor demands remedial legislation, the majority of the committee, all of whose members are most friendly to labor and to labor unions, are forced to the conclusion that this substitute bill would give rise to problems much more grievous than those which it seeks to solve. (See p. 15, Report of Judiciary Committee of the Senate.)

We fully agree with this statement, as applied to the substitute bill in its amended form (amended by the committee after its submission by the subcommittee).

In this final amended form drastic changes have been wrought in the text, and much of the merit of the substitute bill as first offered, before the committee amended it, has been by insertion and deletion taken out of the bill. But before discussing the effect of the amendments, let us consider the substitute bill as originally offered by the subcommittee. We believe that the bill was drafted for the bona fide purpose of correcting the evils which, in the judgment of many, had been constantly accumulating in the judicial decisions justifying the use of the injunction in labor disputes.

In view of what is said in the cases decided in the higher courts in recent years, it is very doubtful whether the substitute bill would accomplish more than the Clayton Act. We recognize its high merit in denying relief in the Federal courts, both at law and in equity, in any case based on the vicious antiunion contract, properly designated "yellow dog." We truly hope that Mr. Frankfurter may be right when he says (The Labor Injunction, pp. 212–214):

> Having regard to the motives behind such agreements and their practical consequences, section 3 withdraws from them the support of the Federal courts by making them unenforceable both at law and in equity.
>
> Such a provision has ample constitutional justification. The fifth amendment, which prohibits Federal legislation from taking liberty or property without due process of law, was utilized by the Supreme Court to invalidate the section of the Erdman Act which made it a criminal offense for interstate carriers to require their employees, as a condition of continuing employment, to enter into contracts for abstention from union membership. That decision is inapplicable to the proposed section 3. Formation of the agreement is not made a criminal offense and the agreement itself is not rendered a nullity, but is simply denied force in the Federal courts. The contracting parties remain free to seek such court relief as may be available in the State tribunals; merely the Federal courts must decline to recognize rights based upon these agreements. Clearly thereby Congress is denying a litigant no constitutional right:
>
> "The right of a litigant to maintain an action in a Federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. * * * The Constitution simply gives the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right." (Kline *v.* Burke Construction Co., 260 U. S. 226, 233.)

But we are not able to find in this argument the support which he claims for his conclusion. What distinction in principle and ultimate effect is found between the Adair case (208 U. S. 161) and the Bedford Cut Stone case (274 U. S. 37)? The Adair case held unconstitutional section 10 of the Erdman Act (30 Stat. 428). The Bedford case justified the issuance of an injunction on the ground that the conduct complained of violated the interstate commerce and Sherman acts. Each case involves the same underlying conception, to wit, that an established business, its good will and organization, and the right to contract and to carry on business without interference from anyone, constitute property rights protected by the fifth amendment.

What assurance have we that the substitute bill will not receive the same treatment in a civil case that the Erdman Act received in the Adair (criminal) case? There is nothing which renders a criminal provision of a statute more susceptible to the influence and paramount effect of the fifth amendment to the Constitution than a provision designed to limit the use of judicial process where the effect is to permit property to be injuriously affected by a withdrawal of protection it had theretofore received. It all comes back to the definition of property. Give to property the definition adopted during the last two decades by the Supreme Court of the United States where the issuance of injunction in labor disputes has been questioned, and you can not escape the effect of the decisions of the court in such cases as Adair *v.* United States (208 U. S. 161); Adkins *v.* Children's Hospital (261 U. S. 525); Coppage *v.* Kansas (236 U. S. 1); Bedford Co. *v.* Stonecutters' Assn. (274 U. S. 37); Duplex Co. *v.* Deering (254

U. S. 443); Truax *v.* Corrigan, (257 U. S. 312); Hitchman Coal & Coke Co. *v.* Mitchell (245 U. S. 229); American Foundries *v.* Tri-City Council (257 U. S. 184). Injunctions will continue to issue as they now do whenever the moving papers base a case for relief upon a showing which invokes the protection of the fifth amendment.

The substitute bill in section 5 attempts to eliminate the criminality or illegality which is declared to exist in concerted action. It rests upon the principle that acts essentially lawful in themselves do not become unlawful when committed by several persons acting in concert. The idea that, when men do in concert that which is not unlawful if committed by one man alone, they are thereby guilty of conspiracy which courts of equity will suppress by the use of injunction, is an innovation which has no historical justification. Such a theory was never recognized except in a few scattered common law cases. The fallacy of this rule and the lack of support or authority for it in the English common law or in the early American cases, is fully explained and exposed in an article by Professor Sayre in Harvard Law Review, volume 35, page 393. Professor Sayre shows how a loose statement made by Hawkins in his Pleas of the Crown, published in 1716, in London, was a few years later seized upon by one of the Judges who said in Rex *v.* Edwards, 8 Modern 320, that a "bare conspiracy to do a lawful act to an unlawful end, is a crime though no act be done in consequence thereof." This false notion of criminal responsibility was from time to time adopted in a few isolated cases where such conspiracy indictments were sustained even though they failed to charge either a crime or a conspiracy to use means criminal in themselves. These cases nearly all dealt with conspiracies among striking employees, and the English statute of laborers undoubtedly influenced the courts to adopt the Hawkins notion of criminal conspiracy. The idea that combination and concerted action make acts, in themselves lawful, unlawful when committed by more than one person, was made the basis of criminal conspiracy in the case of State *v.* Burnham, (15 N. H. 396). The court said:

> An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression. * * * When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to indictable offenses in order to make the offense of conspiracy complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offense exist.

This early New Hampshire case has since been overruled, and the American cases do not sustain the rule there laid down. A careful consideration of common law cases leads inevitably to the conclusion that to sustain an indictment for criminal conspiracy "either criminal means or a criminal end" must be proved.

While this false doctrine of criminal conspiracy has not developed to any appreciable extent in modern times in the criminal law, it has become the very essence of the law of "labor injunction conspiracies," if we may coin such a term. Under this doctrine, acts entirely lawful in themselves become highly unlawful when committed by a group

of striking employees. Congregating, loitering in groups, loud talking, when committed without overt acts which change the assembly into a riotous gathering or unlawful assembly constituting a breach of the peace, all become highly unlawful and the ground for injunctive relief.

The substitute bill as originally drawn is to be commended for placing such theories beyond the reach of the courts by direct prohibition. Its provisions withholding injunctive relief against mere concerted action would go far toward correcting the injunction evil in labor disputes. But we again come back to the rule of property about which we complain, and the protection which property so understood receives under the fifth amendment. If "property" of an employer is injured or interfered with by employees acting in concert, as in the Bedford case, then, under that decision, acts admittedly lawful in themselves become highly unlawful when done in concert. Thus the whole situation comes under the control of the Federal court, on the ground that the denial of an injunction in such case would withhold from a property right the protection of the fifth amendment.

In other words, in order to give effect to the purpose sought to be accomplished by the substitute bill, it is necessary to provide a more substantial basis than has yet been suggested for escaping the far-reaching effect of the fifth amendment. That basis is to be found in the provisions of the thirteenth amendment, which will be discussed a little later.

We are not impressed with the argument set forth on page 6 of the majority report that the stated policy of the substitute bill invades the prerogatives of the States; for everyone must recognize the power of Federal courts to deal with any aspect of a case properly submitted to them under the diversity of citizenship clause in article 3 of the Constitution. The power to deal with industrial matters which are at all related to a Federal question must inhere in the Federal jurisdiction, in a controversy properly submitted to a Federal court. As the Sherman Act and other antitrust legislation regulate matters properly within Federal jurisdiction, under the "commerce clause," Congress has the undoubted right to act within the field of industrial disputes, in the exercise of its acknowledged jurisdiction. In fact, under one pretext or other, resort is nearly always had to Federal courts in labor disputes. How the majority can disregard this repeated interference by the Federal courts in labor disputes, and say that a declaration of policy upon the subject invades State authority and is not within the province of Congress, is not easily understood.

The majority report argues that the attempt to restrict the issue of injunctions is an "unconstitutional encroachment on the judicial power of the court having jurisdiction." It is of course quite clear that Congress has power to limit the jurisdiction of the inferior Federal courts, subject to the implied restrictions in the Constitution and its amendments. In Kline *v.* Burke Construction Co., 260 U. S. 226, 233, the Supreme Court stated:

> The right of a litigant to maintain an action in a Federal court (on the ground of diversity of citizenship) is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly, it is not a right granted by the Constitution. * * * The Constitution simply gives to the inferior

courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right.

This extension of judicial power to "controversies between citizens of different States" has been limited by congressional enactment from time to time. Congress first limited the jurisdiction of Federal courts in controversies of that kind to cases involving $500 exclusive of interest and costs. It later fixed $2,000 and finally $3,000 as the jurisdictional amount in such cases. This limitation by act of Congress denies access to the Federal courts in the case of litigants whose cause of action is less than $3,000, notwithstanding their diversity of citizenship and the express terms of the constitutional grant.

But the majority argument goes further and denies the right of Congress to limit the Federal courts in their exercise of acknowledged jurisdiction. We can not agree with this contention.

Congress has by statute curtailed the power of Federal courts of equity in at least two instances, viz, Revised Statutes 3224 (U. S. Code, title 26, sec. 154): "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (See Dodge *v.* Osborn, 240 U. S. 118); and Judicial Code, section 265, (R. S. 720, U. S. Code, title 28, sec. 379) providing that no writ of injunction shall issue to stay proceedings in any State court, except in bankruptcy cases. In Smith *v.* Apple (264 U. S. 274) the Supreme Court in speaking of this section said:

> This section, reenacting section 720, Revised Statutes, provides that except in bankruptcy cases the "Writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." It is not a jurisdictional statute. It neither confers jurisdiction upon the District courts nor takes away the jurisdiction otherwise specifically conferred upon them by the Federal statutes. It merely limits their general equity powers in respect to the granting of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill. (See Simon *v.* So. Ry., 236 U. S. 115; Wells Fargo *v.* Taylor, 254 U. S. 175–185; Natl. Surety Co. *v.* State Bank, 120 Fed. 593.)

The majority report further argues that a statute attempting to render the "antiunion" or "yellow-dog" contract ineffective by withholding from it legal or equitable remedy in the Federal courts, would effect a deprivation of property contrary to the fifth amendment. We think this argument proceeds upon an unwarranted extension of the concept of property as used in the fifth amendment; and can not be upheld in view of the subsequent declaration of the thirteenth amendment. We shall discuss the effect of the thirteenth amendment as applied to labor contracts when we consider the terms and legal effect of the measure we offer in lieu of the substitute bill.

PART 2

SPECIFIC OBJECTIONS TO THE SUBSTITUTE BILL AS AMENDED

There are several omissions and interpolations made by the committee throughout the bill which render some of its provisions objectionable, and in other instances take away substantial relief given by the provisions of the bill as drawn by the subcommittee; several of these are considered in detail below.

The arrangement is involved and does not develop the subject in an orderly and direct manner. In particular, the statement of policy should be made in section 1 rather than in section 2, as is indicated by the fact that a preamble has been deemed necessary as an introduction to this statement. Again, the limitation placed upon the issuance of injunctions by Federal courts in labor disputes is duplicated in sections 1, 4, 5, and 7. Why commence with a statement limiting the exercise of jurisdiction before stating the policy of Congress with respect to the matter?

It is also to be noted that the term "jurisdiction" is used in each of the sections above mentioned, where the evident purpose is to curtail the exercise of jurisdiction as applied to the things enumerated in the bill. In the measure offered in lieu of the substitute, a similar purpose is effected by specifically limiting the exercise of subsisting jurisdiction rather than by striking at the jurisdiction itself.

Section 2: It is not clear just what is the policy intended to be adopted here. Moreover, if such a declaration is to be anything more than innocuous and high-sounding words, if it is to be of real value in the interpretation of legislation, it should be directed toward a definite subject upon which Congress may constitutionally act, and indicate a definite line of action or course of dealing or treatment with respect thereto. But the so-called declaration of policy in section 2 has only a verbal connection with the constitutional power of Congress. It attempts to justify the policy of the bill under the acknowledged power of Congress to control inferior Federal courts, but goes far beyond the scope of such power. In the measure we offer in lieu of the substitute bill the stated policy is predicated on the thirteenth amendment and is set out with respect to an industrial condition of involuntary servitude; the relation of the stated policy and its objective, and of the means to render it effective, to the legislative power of Congress under the thirteenth amendment is clearly stated.

Section 3: The arrangement is involved, and the "undertaking or promise" herein declared unenforceable is stated in an uncertain manner, by reference to the vague terms of the statement of policy in section 2. The particular types of agreement later brought in under the phrase "including specifically the following" are in fact the so-called "yellow-dog contracts," i. e., the most vital subject of

the bill. It is felt that the section as it stands is peculiarly susceptible of misinterpretation and emasculation by the courts, and accordingly in our proposed measure the agreements particularly objectionable, i. e., yellow-dog contracts, are unequivocally condemned in the first instance.

It is, moreover, to be noted that this section (and sec. 4 as well) sets up a purely artificial equality of status between employer and employee, undoubtedly to avoid any charge of unconstitutionality on the ground of classification. But if the singling out of labor contracts for special consideration is warranted at all, it must be on the ground of a practical and fundamental difference between the laboring man and other classes of contractors, and is not effectually bolstered up by an unreal semblance of equality. In fact, the very introduction of such a semblance may well lead the courts to conclude that Congress is attempting to accomplish an end that it recognizes to be beyond its constitutional powers, and may thus jeopardize rather than strengthen the constitutionality of the bill.

Section 4: By specifically denying the jurisdiction of the court to issue injunctions in the particular cases enumerated in clauses (a) to (i), the bill would warrant the court in holding that the inclusion of these particular items would authorize an injunction prohibiting all other kinds of conduct. There is great danger in the attempt to enumerate the cases where the injunction shall be denied, lest in each instance some particular conduct intended to be within the protection of the statute may under closer scrutiny and analysis fail to come within its terms. Herein lies the danger of delusive exactness in the matter of definition.

The use of the phrase "By all lawful means" and the term "peaceably" further qualifies the protection of the bill by restricting it to conduct which is actually considered lawful at this time. It merely formulates and gives legislative sanction to the limitation which the courts have already used to limit and render the Clayton Act innocuous and ineffective. (See American Foundries *v.* Tri-City Council, 257 U. S. 184.) And when we consider that in clause (e), relating to permissive publicity, the very valuable provision permitting such publicity "whether by advertising, speaking, patroling, or by any other method not involving fraud or violence" has been stricken out by the majority, it will be seen that the section thus emasculated is so limited that it is likely to exclude from the protection of the bill all conduct not allowed by express language. It would thus very likely be held to warrant an injunction against peaceable picketing, whereas that is one of the specific things sought to be legalized by the bill. Again, the inclusion of the black print word "threat" in clause (i) renders innocuous the whole attempt to limit the injunction abuse, for you could swamp any case with a bushel basket full of affidavits of those in sympathy with the complainant to the effect that threats had been made, etc.

At common law, as we have heretofore remarked, except for Hawkins's rule and a few isolated cases decided in accordance with it, conspiracy not involving fraud was indictable only when directed to and resulting in the commission of a crime, or when criminal means were adopted for the accomplishment of a lawful object. In recent years, however, the concerted action of employees in striking has in many cases been regarded as an unlawful conspiracy, even though the

conduct complained of would, when committed by an individual, be entirely lawful.

In thus defining the "injunction conspiracy," the concert of action is deemed the gist of the social offense, and neither the object of the conspiracy nor the means by which it is to be carried out need come within the scope of the criminal law. The overt act is not at all necessary.

Section 7: The substitute bill as originally drawn, after first legalizing concerted action within enumerated limits, provided further that an injunction should not be issued unless the court found "that unlawful acts have been committed," thus introducing the feature of an overt act.

The bill was thus in accord with the weight of authority under the common law. The majority has however, introduced the word "threatened," so as to make it a sufficient ground for the issuance of an injunction that unlawful acts "have been threatened" only.

In its use of the terms "lawful" and "unlawful" the substitute bill in effect adopts and codifies the present standard of legal conduct as the standard in accordance with which the conduct mentioned in the bill must be measured and classified.

Under the earlier cases in equity, injunctions to restrain trespasses required proof of at least one trespass, and convincing proof that others might be expected to follow. Arrest and conviction, or an action at law for pecuniary damages, were regarded as sufficient to take care of one or two violations; a condition where repeated trespasses and law violations would be anticipated was required, to justify an injunction. Repetition was the gist of the case. Multiplicity of suits, expense of prosecution, failure of the law courts to adequately protect property in its true sense or to guard against the destruction of tangible property by repeated trespasses, authorized the exercise of the extraordinary power of the chancellor to supersede the ordinary process of the law courts. Under this bill, on the other hand, it would be enough, to warrant the issuance of an injunction, that threatened action might produce harmful results, without proof of even one act of trespass which would subject the offender to trial and punishment in the criminal courts or to suit for damages.

Clause (c) of section 7 leaves it to the court to decide which of the parties to the controversy will suffer the greater damage. If this provision is adopted, the court would be confronted with a requirement almost impossible of performance. The court would be expected, on a preliminary injunction hearing, to appraise and weigh each item of testimony, to consider its relation to every other item, and to then make a finding that as to each item of relief granted the damage or injury would place a greater burden on the plaintiff than the relief would on the defendant. A preliminary hearing is not expected to develop all of the testimony and proof which may be offered on final hearing after the issues have been made up. The injunction pendente lite is in its very nature a preliminary step based on a prima facie necessity for the demanded relief. The impracticability of weighing, comparing, and appraising with any exactness testimony introduced upon each item of relief prayed for, is apparent.

Threats sufficient to form the basis of complaint might easily come from wholly unauthorized sources, and yet be regarded as sufficient to justify an injunction under the substitute bill. The overt act,

viz., the consummated unlawful act, would at least furnish a definite basis for the issue of an injunction, which could be definitely proved and established. The case would rest upon something more substantial than a mere supposition in the mind of the chancellor that an unlawful act might be committed.

Section 8: The inclusion of the black-type provisions, when considered in connection with section 7, bring the injunction situation right back to where it now is. Sections 7 and 8 by statutory provision regulate the injunction and permit its issuance, precisely as it was regulated and issued in the case of American Foundries Co. *v.* Tri-City Council (257 U. S. 184). For, as above suggested, a showing of threatened irreparable injury would be made in practically every case; the requirement of compliance with arbitration laws, etc., therefore becomes of little practical value.

Section 10: This was changed by the committee; as originally drawn, the jurisdiction of the courts of appeal in injunction cases was clearly stated. No reason is suggested for the omission of the words stricken out.

Section 13: The expression is rather involved, and the meaning not entirely clear. The elimination of the words "direct or indirect" would confine the issue to the immediate relation of employer and employee, or to those in the same industry, and unduly limit the class of persons who are deemed to have sufficient interest in the labor dispute to justify their efforts in helping others in the same dispute.

The bill contains many wholesome provisions, and would have afforded some relief if allowed to remain as originally drawn by the subcommittee. As now presented in the form in which it has been modified by the majority of the committee, it is of doubtful value and does not materially change the present application of the injunction remedy to labor disputes. The provisions relating to jury trial in case of indirect criminal contempt, and to the retirement of the sitting judge where the contempt involves reflection on his character and conduct, are valuable. They introduce a measure of relief in cases otherwise almost hopeless, when the judicial aspect of the labor injunction is considered; but, to accomplish the result expected from the use of the terms employed, this relief should not be tied up with the present bill. These provisions should be made the basis of separate enactment.

PART 3

THE MEASURE PROPOSED IN LIEU OF THE AMENDED SUBSTITUTE BILL

AN ACT FOR THE ENFORCEMENT OF THE THIRTEENTH AMENDMENT IN RELATION TO INJUNCTIONS IN LABOR DISPUTES AND FOR OTHER PURPOSES

Whereas under modern social and industrial conditions increasing numbers of people are compelled to work for wages in order to provide for the support and maintenance of themselves and their dependents; and

Whereas there is an increasing tendency to combine and bring together in corporate form, and in many instances under a single management, the resources and capital formerly employed in competitive effort in the same line of industrial activity, which combination and aggregation of industrial resources constantly tend toward the employment of greater numbers of people as wage earners in a single enterprise; and

Whereas by virtue of such corporate organization and of interlocking directorates and other corporate affiliations, employers are commonly able to dictate and impose terms and conditions of employment to large numbers of men, women, and children; and

Whereas the said employers have in many cases been regarded by the courts as possessing a property right in the uninterrupted continuance of employment under the conditions so dictated and imposed, which alleged right has been protected through the injunctive power of equity; and

Whereas this alleged property right in the labor of human beings has been emphasized and made more effective through the enforcement by the courts of the so-called "yellow-dog" labor contract which, as a condition of employment or continued employment prohibits workers from organizing for their own protection; and

Whereas the courts have likewise regarded the patronage of a business by human beings as giving rise to a property right in the continuance of such patronage, in which the proprietor of the business is entitled to be protected by the courts; and

Whereas the enforcement of such alleged rights under the conditions above set forth, through the exercise of the injunctive power of the courts, creates a condition of involuntary servitude on the part of the men, women, and children employed, contrary to section 1 of the thirteenth amendment to the Constitution of the United States, which provide that—"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"; and

Whereas section 2 of the same amendment provides that "Congress shall have power to enforce this article by appropriate legislation;"

Now therefore, for the purpose of correcting the conditions above set forth:

Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, That every human being is hereby declared to have under the thirteenth amendment an inalienable right to the disposal of his labor free from interference, restraint or coercion by or in behalf of employers of labor, including the right to associate with other human beings for the protection and advancement of their common interests as workers, and in such association to negotiate, through representatives of their own choosing, concerning the terms and conditions of employment, and to take concerted action for their own protection in labor disputes.

SEC. 2. That no act which may, under the provisions of section 1 of this act, be lawfully done by an individual, shall be deemed or held to be unlawful when done by the concerted action of any number of individuals.

SEC. 3. That no court of the United States or of any State or Territory or of the District of Columbia shall grant injunctive relief or exercise the equity power in any manner or form so as to interfere with, limit, or restrict, directly or indirectly, the exercise of any of the rights or privileges enumerated in section 1 of this act.

SEC. 4. That no court of the United States shall issue any restraining order or temporary or permanent injunction in any case upon the ground that the doing in concert of any of the acts enumerated in section 1 of this act constitutes an unlawful combination or conspiracy.

SEC. 5. That every agreement the effect of which would be to prohibit, as a condition of employment or of continuance in employment, (1) membership in or affiliation with any organization having for its object the improvement of working conditions, the regulation of wages and/or hours of labor, collective bargaining, and/or the taking of concerted action for these or kindred purposes; and/or (2) the exercise of any of the rights enumerated in section 1 of this act, is hereby declared to be contrary to public policy and void.

SEC. 6. That no court of the United States or of any State or Territory or of the District of Columbia shall enforce, by any legal or equitable process, any agreement or portion thereof declared contrary to public policy and void by section 5 of this act.

SEC. 7. That no court of the United States shall issue any restraining order or temporary or permanent injunction to prevent interference with any alleged right in the proprietor of a business to the continued patronage of such business, except as against a person who is under a valid contract not to interfere with such patronage.

SEC. 8. Any provision of the Sherman Act of July 2, 1890 (26 Stat. 209), the Clayton Act of October 15, 1914 (38 Stat. 730), or any other act of Congress inconsistent with the provisions of this act, is hereby, to the extent of such inconsistency, repealed.

SEC. 9. If any provision of this act, or the application thereof to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

This proposed measure rests upon two distinct propositions—one of fact, the other of law.

The proposition of fact.—A condition of involuntary servitude, referred to in the preamble, exists in many of the large industries of the United States. Great corporations preempt almost the entire field of activity in the particular industry they are engaged in. They dominate the affairs and concerns of those engaged in that particular field. They resort to the use of the injunction to assist in maintaining their control. These corporations, with the aid of other corporations of a similar kind, and of the banks and allied interests, commonly dictate the terms and business conditions prevailing in their particular field.

To obtain employment in these industries, one has to accept the wage and terms of employment offered. It is idle to say that in a contract of employment under such circumstances the employee exercises freedom of contract, or that there is genuine mutuality in such agreements. We disregard the facts of life if we say that the workers in these highly specialized industries, controlled by huge financial interests, have any genuine freedom of expression or any real influence in fixing the terms of their employment.

The concentration of great wealth in the development of any one field of human endeavor, through the agency of holding companies and subsidiary concerns and other devices, makes it possible for a small group of men to arbitrarily prescribe the basis and control the terms and conditions of employment in that field. The workers are forced by economic necessity to accept employment on the terms offered, and are powerless to make the slightest change in their wages or working conditions.

In this situation, only united action on the part of the employees can give even a semblance of equality. It is out of this economic necessity that labor unions have sprung; and the essential fairness of such united action, as a means of securing that equality which is fundamental in our constitutional government, has been recognized by the Supreme Court; e. g., in American Foundries *v.* Tri-City Council, the court declared through Chief Justice Taft (257 U. S. 184, 209):

> Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious.

The dominating position of the employer and his control over his employees is greatly strengthened by the use of yellow-dog contracts such as were sustained in the Hitchman Coal Co. case. These contracts prohibit, as an absolute condition of employment or continuance in employment, any association of employees for mutual protection other than is expressly authorized by the employer. In case any employee attempts to join a real labor organization of any kind, he is immediately deprived of any effective power to earn a livelihood, and in many cases he and his family are summarily ejected from the employer-owned cottages in which they live their colorless lives. (See Red Jacket Consolidated Coal & Coke Co. *v.* Lewis, 18 Fed. (2 ed.) 839.) Under such conditions, it is clear that the worker is in a position of absolute helplessness, completely at the mercy of the employer.

The proposition of law is that, where men are employed and required by their circumstances of life to labor under conditions such as those set forth above, there exists a condition of involuntary servitude which is prohibited by the thirteenth amendment.

That involuntary servitude is a status broader and more far-reaching than mere African slavery is clear by the terms of the thirteenth amendment. This amendment undoubtedly operates by implication as a repeal of the fifth amendment, in so far as any property in a human being was recognized by that amendment. The fifth amendment was proposed by the First Congress in 1789, and ratified by the States shortly thereafter. At that time slavery was not prohibited by the United States Constitution. The fifth amendment, passed as a part of the bill of rights, recognized the property of the free white man in the black man and in the poor white bound to contract service. Imprisonment in the common jail for debt was an every-day occurrence. The purchase of the creditor's contract with the contract laborer and the right to exact payment by continued labor was a recognized institution. All the well-known forms of servitude,

peonage, and contract debt, together with African slavery, gave rise to property rights which were protected by the amendment in the same manner as other personal property. They were, in fact, varieties of personal property, with all the attributes of ownership common to personal property of a physical material sort.

This concept of property prevailed until the emancipation proclamation during the Civil War, and the adoption of the thirteenth amendment immediately thereafter. So firmly established was this concept of property that the Supreme Court of the United States in the Dred Scott case held that Dred Scott did not become a free man when his master took him into the free State of Illinois and established his residence there; that he had the right to take him, along with his other property, into Illinois; and that his ownership was not in the least affected. Dred Scott was not a citizen, not a free man, but property, the ownership of which the fifth amendment would protect.

The fifth amendment was amended so as to exclude the notion of any property right in a human being by the adoption of the thirteenth amendment. Since the adoption of the thirteenth amendment there has been in the United States no property in a human being. The notion that human service is property can no longer be maintained.

Property under the law has a fixed and definite quality. The police power of the State may control or regulate it. It is subject to the rights of eminent domain and of taxation, and must respond to the lawful demands which organized society makes upon it, but its high quality of property remains unchanged. Labor is to be distinguished from the fruits or products of labor. The God-given qualities of man, with his will to do, with his power and faculty of imagination and creation, his right to life, liberty and property under the Bill of Rights of William and Mary, under the Declaration of Independence, under the thirteenth amendment, and under the ethical and spiritual concepts of organized society in the Christian world of to-day, all unite to establish definitely this simple proposition—the labor of a human being is not property which can now be protected by the fifth amendment. The thirteenth amendment prohibits this.

Therefore any labor condition which is tantamount to involuntary servitude is within the prohibition of the thirteenth amendment, and subject to direct prohibition by Congress under section 2 of that amendment.

All other legal principles, axioms, and maxims, all legal, moral, or ethical considerations, and all former inconsistent provisions of the United States Constitution or the first 12 amendments must yield obedience to this higher command—neither slavery nor involuntary servitude shall longer exist.

Prior to the introduction of Senator Shipstead's bill relief had been sought in legislation designed specifically to limit the issuance of injunctions in labor disputes. Senator Shipstead's bill, on the other hand, proceeded upon the theory that the trouble lay in the definition of the "property" which is entitled to protection under the fifth amendment. "Property" under the fifth amendment, as developed by a long line of cases, has come to include not only tangible and transferable property but the intangible rights supposed to arise from contracts of employment, in spite of the declaration in section 6 of the Clayton Act (38 Stat. 731) that the "labor of a human being is

not a commodity or article of commerce." The fifth amendment has thus stood as a bulwark against efforts to limit the issue of injunctions; and Senator Shipstead's bill was rejected by the subcommittee substantially on the ground that it would withdraw from this extended sort of property a type of relief hitherto enjoyed. But if, out of the relationship of employer and employee, a condition of involuntary servitude results, then the property rights protected by the fifth amendment must yield to the protection of human freedom announced and guaranteed by the thirteenth amendment.

And, after all, isn't this all that the proponents of the measure seek? They aren't concerned with the property aspect of a contract of employment nor with the remedies for a breach on either side considered as a simple chose in action. It is the effect of the labor contract in the great industries which is to be considered in the effort to grant or withhold in respect to such contracts or relationships, the right to enjoin laborers from combining for their economic protection. The fifth amendment furnishes the employer ample protection in such relationships. The thirteenth should similarly furnish to employees the relief which has been denied by the courts by reason of the operation of the fifth amendment and the definitions by which the courts take the economic relationship of employer and employee under their control.

The bill proposed in lieu of the substitute thus reaches the result which Senator Shipstead attempted to reach by the definition of property. This bill, although making what we regard as a permissible classification with respect to labor, places the whole subject squarely under the thirteenth amendment. And the relief sought for herein, when applied to a condition in the industrial world where involuntary servitude does in fact exist, is clearly within the power of Congress to grant.

The second section of the thirteenth amendment gives Congress power by "appropriate legislation" to carry out the provisions of the amendment prohibiting involuntary servitude. Under this section, Congress clearly has a broad discretion in determining the exact scope of necessary legislation. There must, of course, be a reasonable relation to the constitutional grant of power, to justify a statutory prohibition. But what constitutes such a reasonable relation is a matter of legislative, not judicial, determination. This is common doctrine, well stated in Rose *v.* U. S. (274 Fed. 245):

> Unless the enactment has no substantial relation to the enforcement of the constitutional prohibition, * * * the court has no power to determine the wisdom of the enactment or challenge the manner of the exercise by Congress of the authority and discretion confided to it by the second section of this (eighteenth) constitutional amendment.

In the preamble of the proposed bill, Congress declares as a matter of fact within the information of Congress, that certain conditions in modern industry amount to involuntary servitude. This declaration is no part of the law proposed, but it can not be ignored in the interpretation of that law. It establishes, beyond the proper scope of judicial authority to question, a foundation based upon the actual facts and conditions of modern life; it demonstrates that in the opinion of Congress the time has come for the legislative policy of the United States to keep step with economic development.

The Constitution nowhere defines "involuntary servitude," but the Supreme Court has clearly and definitely exploded the notion that it is confined strictly to some set and definite system of slavery or peonage. In Bailey *v.* Alabama (219 U. S. 219, 240) the court, speaking through Mr. Justice, now Chief Justice, Hughes, declared:

> The language of the thirteenth amendment was not new. * * * While the immediate concern was with African slavery, the amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. The words involuntary servitude have a "larger meaning than slavery." * * * The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude.

The power of Congress to "enforce" the thirteenth amendment must therefore, in the nature of things, involve a proper discretion as to the ultimate meaning and scope of the term "involuntary servitude." It must have power to determine how far conditions likely to give rise to involuntary servitude must themselves be prevented, in order to secure the freedom intended by the amendment.

No better instance of such necessary incidental discretion can be found than in the case of the eighteenth amendment. The language of the amendment is very similar to that of the thirteenth—

> The Congress shall have * * * power to enforce this article by appropriate legislation.

and the subject thus entrusted to the legislative control of Congress, was, as in the thirteenth amendment, undefined in the amendment itself. In pursuance of this power, Congress, in the Volstead Act, set a limit to the scope of its regulatory legislation which has been strongly criticized as in fact beyond the intent of the term used in the amendment; it flatly declared that beverages containing one-half of 1 per cent alcohol should be subject to the constitutional prohibition against intoxicating liquor. But the Supreme Court held, in Ruppert *v.* Caffey (251 U. S. 264, 298):

> It is therefore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one.

Surely on the authority of the Ruppert case it is within the power of Congress to determine what industrial conditions are likely to give rise to a condition of involuntary servitude, and to prohibit such conditions as a violation of the thirteenth amendment.

And it has been stated by the Supreme Court in Purity Extract Co. *v.* Lynch (226 U. S. 192):

> It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

The bill proposed in lieu of the substitute bill provides in direct terms that employees may combine and unite for their protection in labor disputes. It specifically legalizes concerted action. It condemns in express terms the yellow-dog contract. It denies injunctive relief in

the courts of the United States and of the States. It is based primarily upon the thirteenth amendment, on the theory that a real condition of involuntary servitude is created when the injunction is used to compel men to remain at work, as in the Bedford Co. case. It may be argued that these conditions separately considered are not so directly related to the subject of involuntary servitude as to be within the power of Congress to prohibit. The answer is that these conditions are so interrelated in modern industry that they become integral parts of an industrial system which, especially when the injunction issues, reduces all employees covered by it to a condition of involuntary servitude.

The situation as a whole may well be compared to a huge stockade with one entrance only. All the elements of servitude are present within the stockade, even when the entrance is left open. The men are employed by one employer who tenders them employment on his own terms. He has for his aid the yellow-dog contract; there is a fixed conception in the minds of the courts that he has a property right in the uninterrupted continuance of his business and in the labor of his employees. Economic conditions in and out of the stockade are such that the employee must accept the wages offered or starve.

But the servitude is rendered still more complete and effective when we close the stockade entrance by the injunction decree. The vicious circle is now complete; the controlled industry, the one employment with no competing plant to offer opportunity to labor, the yellow-dog contract, the property rights protected by the courts under the fifth amendment, and finally the injunction which deprives the employee of even the vestige of an alternative. And the terms of the injunction decree when carried into effect isolate the individual and tend to outlaw him as fully as a medieval decree of ex-communication. No one may help him or offer him aid or assistance. The hand of the chancellor rests heavily upon him. He must abide by the decree or go to jail. Read the decree in the Red Jacket case if you have any doubt of the terrible result.

We have already acknowledged that the substitute bill has substantial constitutional support for its effort simply to restrict the exercise of the injunctive power by the Federal courts in labor disputes. The power of Congress over the jurisdiction and procedure of the inferior courts is undoubted. Apart from the possibility that the fifth amendment may prove an obstacle to its enforcement, there appears no objection to basing legislation for this purpose squarely upon Article III of the Constitution. With this restricted purpose in view, sections 4 and 7 of the lieu measure have been drafted as a restriction only on the courts of the United States with respect to the issuance of injunctions. These sections, in view of the separability clause in section 9, are clearly so independent that they would remain in effect, even if the other sections based on the thirteenth amendment should be held unconstitutional. In fact, we think the whole bill could still be regarded as valid with respect to the Federal courts, and the reference to courts of the States disregarded, if such reference could not be justified as a proper exercise of power under the thirteenth amendment.

The substitute bill denies enforcement of the yellow-dog contract in the Federal courts. It legalizes concerted action of employees

when the same acts would be lawful if committed by isolated individuals. It prohibits the issuance of injunctions in specified instances. All these objects are provided for in our proposed measure, with equal if not greater effectiveness; and the lieu measure has the additional merit of placing human labor above the mere property considerations of the fifth amendment.

The provisions of the substitute bill with respect to procedure in cases of indirect contempt appear to be general in their character, and not confined to labor disputes; they would more properly be the subject of separate legislation.